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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 943

J. D. COLLINS,

Petitioner,

vs.

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW, ET AL.

No. 944

S. D. LOUNT,

Petitioner,

vs.

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW, ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF OF PETITIONERS.

JOHN J. McCULLOUGH,
Counsel for Petitioners.

E. E. SELDEN,
Of Counsel.

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HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; NIELSINE HERLICK, A WIDOW; L. SKREHOT, A WIDOWER; JOHN J. HANLON, AS TENANT; KATIE F. YOUNG, A WIDOW,

Respondents.

No. 944

S. D. LOUNT,

Petitioner,

vs.

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; COIT I. HUGHES AND H. B. HUGHES, WIFE OF COIT I. HUGHES,

Respondents.

REPLY BRIEF OF PETITIONERS J. D. COLLINS AND S. D. LOUNT.

Statement of Case.

The statement of the case by respondents L. Skrehot and Katie F. Young is incomplete in the following respects, to-wit:

On page three of said respondents' brief, the last three lines, we find the following:

> "* * * and disposed of the residue of the estate by distribution of all the rents, issues and profits and

> the proceeds of any sale or sales of real estate to said Trustees."

This is inaccurate because the rents, issues and profits were not given to the Trustees in any such unfettered manner.

They were directed in substance to manage, control, lease, sell and distribute any and all of the residue of the estate as:

> "they in their judgment shall deem best for the beneficiaries hereunder * * *" (R. C. 10) (R. L. 12).

The whole of the residue of the estate was clearly put in the hands of the son and daughter "JOINTLY" (R. C. 10) (R. L. 11).

> "IN TRUST HOWEVER" (R. C. 10) (R. L. 11).

The only tenable construction of the Will makes the whole residue subject to the trust and directs that said residue is to be controlled by the trustees as they deem best for their own interest. The legal title was thus vested in fee in the trustees JOINTLY subject only to the terms of the trust.

It is therefore incorrect to say that petitioner claims that the Will of Julia A. Lount, deceased, vested in said trustees

> "a life estate only" (See brief of Skrehot and Young, page 4).

What petitioner does contend is that the legal title is vested JOINTLY in the trustees in fee subject to the trust but the BENEFICIAL estates are not joint estates but are owned in severalty by the heirs of Julia A. Lount, as successors to the beneficial interest of William B. Lount, now deceased, and Hattie L. Mosher. That these beneficial estates are IPSO FACTO "life estates" and for this very reason can not merge with the JOINT ESTATE held by the trustees in fee, because the beneficial life interests differ from the legal fee both in quantity and quality.

Argument.

It is true that the question of whether the life estates created were merged into fee simple estates, is not, in express language, discussed in the cases of *In Re Sears Estate*, 54 Ariz. 52, 91 Pac. (2d) 874, and *Smith* v. *Teel*, 35 Ariz. 274, 276 Pac. 850, but the inescapable EFFECT of the decisions is that in Arizona, the broadest possible powers of management and sale, coupled with a life estate do not convert the life estate into a fee simple.

We quote from *In Re Sears Estate* (*supra*), page 875, Col. 2, as follows:

> "I give unto my said wife the full power and authority to use and consume all or any portion of my estate and to that intent and purpose I give her full power and authority to lease, mortgage, sell or otherwise manage and dispose of any and all of the same to the same extent and in the same manner that she would use and enjoy the same were it her sole and separate property, without making any accounting therefor to any one or to any court whatever.
>
> Item Three: Upon the death of my said wife, whatsoever of my estate then remains, I give, devise and bequeath in the following manner, to-wit: * * *".

The analogy to the case at bar is striking, the only essential difference being that the residual beneficiaries in the instant case take by operation of law, whereas in the "*Sears*" case they are named.

In the "*Sears*" case the remainder is spoken of as

> "At most residual and contingent" (91 Pac. (2d) 875, Col. 2).

Nevertheless it is apparent that the will of W. P. Sears, deceased, is upheld and the life estate is not regarded as having merged in the fee because the case of *Smith* v. *Teel*, 35 Arizona 274, 280, 276 Pac. 850, 852, in which a similar life

estate is specifically upheld, is quoted with approval, and for the further reason that the Supreme Court said 91 Pac. (2d) 874, at 876, Col. 1,

> "The court correctly rejected the exceptions to the annual report and account of the executrix".

If the remainder of the estate had been merged in the life tenant and she had become the outright owner of the personalty and the fee simple tenant of the realty, then there would have been no reason for any accounting whatsoever.

In the case of *Smith* v. *Teel*, 35 Ariz. 274, 276 Pac. 850, the court specifically says that the interest of the widow and life tenant having very broad and almost unlimited power of sale, is a LIFE interest. We quote from 276 Pac. at page 852, Col. 1, as follows:

> "Under these facts it is clear that Mrs. Smith was the owner in fee of one half of the 70 acres, it being community property, and under the terms of Mr. Smith's will that she was also after his death the owner of a life interest in the other half."

It is clear therefore that our State Supreme Court necessarily decided in each of the foregoing Arizona cases that the mere addition of very broad powers of sale to a life estate does not create a fee simple estate.

The life tenants in the two Arizona cases cited, not only had the power of sale, but were invested with the unrestricted use of the rents, issues and profits of the estate, in like manner as William B. Lount and Hattie L. Mosher, in the Will of Julia A. Lount, deceased.

It is next argued by respondents Skrehot and Young that Section 4232, Revised Statutes of Arizona, 1901, has never been interpreted with reference to the questions here involved.

We think it is not necessary that Section 4232, Revised Statutes of Arizona, 1901, should have been interpreted by

our Supreme Court. The fact that such a statute existed in Arizona in 1901, renders it PROBABLE that the decision of the Circuit Court of Appeals is in conflict with local decisions, thought not yet rendered.

> "While absence of a decision in a state court on a statute prevents proof of an exact conflict thereon, the petitioner nevertheless may satisfy the reason by demonstrating that 'probably' the decision is in conflict with applicable decisions of the state courts."
>
> *Hughes Federal Practice*, Vol. 8, Chapter 102, Section 6302, at page 549, last 5 lines of Paragraph (2).

Petitioners respectfully state to this Court that this is the first time any petition requesting a writ of certiorari to the Circuit Court of Appeals, has ever been filed, concerning the Will of Julia A. Lount, deceased.

It is true that a matter concerning the estate of Julia A. Lount, deceased, was taken to the Circuit Court of Appeals where an adverse ruling was rendered. The opinion in this case may be found in 91 F. (2) at page 582.

This court will observe that the case in 91 F. (2) 582 is captioned "*Collins* v. *Mosher*".

Hattie L. Mosher is sued as an individual.

It is quite apparent from the very outset that the learned counsel for appellant (Collins) in that case never regarded the Will of Julia A. Lount, standing alone, in and of itself, as creating a valid trust.

It is said in the foregoing case at page 584, Column 1, line 24:

> "He argues that a trust was created by the will in favor of UNNAMED beneficiaries and that the identity of these beneficiaries is disclosed in the oral and written communications said to have been made by the testatrix to her son and daughter."

No rule of law is more firmly imbedded than the rule that extrinsic evidence may be used to identify named beneficiaries or to clarify ambiguities, but never to supply something altogether omitted from the will.

Moreover counsel in the cause of *Collins* v. *Mosher,* 91 F. (2) 582, clearly did not believe the will standing alone created an express trust.

It is said in the foregoing cause

> "Some years later the two agreed upon a division of the property between themselves and exchanged quit claim deeds to effect the division. In the exchange the lots in question were conveyed to the respondent."

Thus it appears that in the foregoing case the respondent, Hattie L. Mosher, was treated as being the owner of the lots in fee simple.

Under such conditions if there was any trust at all in favor of Collins it could only have been in the nature of a constructive trust. The will would be only incidental to the establishment of such a trust as tending to corroborate the intent of the testatrix as evidenced by the letter.

In the instant case Hattie L. Mosher is sued as trustee. It is petitioners' contention that this will was drawn by the subscribing witnesses, W. H. Stilwell and J. M. Jamison, both of Phoenix, and both experienced practitioners licensed to practice in the Supreme Court of the United States. The will was written as intended and is valid as it stands.

It effectually carries out the intention of the testatrix as expressed in her letter as set forth in 91 F. (2) at page 584, Col. (2).

It permits her son and daughter to handle the property free of restraint from their respective spouses, a characteristic of all valid trusts, and not an unusual wish on the part of the testatrix.

It also insures by inevitable operation of law, as a resulting trust that any "even the smallest piece of land left"

after the death of the trustees and beneficiaries would then, and not until then, revert back to the estate of the deceased and therefore vest in the grandchildren, the "blood heirs" of the deceased.

The letter should be treated as an explanation of, not as an addition to the will of Julia A. Lount, deceased.

If the deceased spoke of her grandchildren as the trust beneficiaries of her will, it serves but to show her tender regard for them as her "blood heirs". There is no doubt the deceased hoped and expected that much of her considerable holdings would descend to her grandchildren.

Whether the will is silent as to ultimate beneficiaries by design of the learned counsel by whom the same was drawn, as we contend, or by mere inadvertence, is immaterial, for the result is the same.

The specific naming in the will of two beneficiaries, William B. Lount and Hattie L. Mosher with full discretionary powers to manage and dispose of the estate for their own best interest is quite sufficient by the great weight of the authorities to sustain the trust as a spendthrift trust, or at least a discretionary trust, which is in the nature of a spendthrift trust and partakes of its characteristics.

Even unaided by extrinsic evidence to show that the testatrix desired her "blood heirs" to take the reversion, if any, they would do so by operation of law as resulting *cestuis ques trustent.*

In the instant case your petitioners are looking WITHIN the will itself for the "beneficiaries". The will itself is held valid as creating an "express trust". In the case of *Collins* v. *Mosher* counsel for appellant was looking "outside" the will for the beneficiaries, attempting to show a "constructive trust".

In the *Collins* v. *Mosher* case the quit claim deeds between the parties were recognized clearly because no valid trust was claimed to be created by the will itself, standing alone.

In the instant case, both because of the statute Section 4232 Revised Statutes of Arizona, 1901 (Appendix to Petition, page 15), and by the common law the mere act of the beneficiaries of the trust unsanctioned by any court in attempting to divide the trust is repudiated by your petitioners as wholly void.

The trustees could not delegate the trust. They had no power to partition the property, and thus partition the responsibility, between themselves.

Caldwell v. *Graham,* 115 Md. 122, 80 A. 839.

The following is copied verbatim from the Reply Brief in *Collins* v. *Mosher, et al.,* No. 9505, C. C. of Appeals, pages 16 and 17, filed as an Exhibit in the instant case, in this court.

> "It is elementary that the discretionary duties of a trustee can not be delegated and no authorities need be cited upon this *upon this* point.
>
> The trustees had no power to partition the property, and thus partition the responsibility, between themselves.
>
> *Caldwell* v. *Graham,* 80 A. 839, 115 Md. 122, 38 L. R. A. (N. S.) 1029.
>
> Since the purpose of the trust as gathered from the will itself would not be terminated until the death of both trustees, or the exhaustion of the property, it follows, by all of the authorities, that even a Court of Equity, at the request of all of the beneficiaries, they being of lawful age, will not dissolve the trust.
>
> We quote from Bogert on Trusts as follows:
>
> 'In states recognizing Spendthrift Trusts also, it is apparent that the court will not end the trust on application of the *cestuis,* although all are of full age and sound mind.'
>
> Bogert Trusts, Vol. 4, page 2932, Section 1002.
>
> Citing cases from Connecticut, Illinois, Michigan, Kentucky, and Pennsylvania.

Even if the trust was not a Spendthrift Trust the court would not terminate it at the request of the *cestuis.*

We quote:

'But the majority of American Courts which have considered this problem have come to the opposite conclusion, and have declined to decree the termination of an active trust, with purpose to be achieved, even though it was not of spendthrift character and even though all cestuis were in existence, ascertained, competent, and before the court praying for its extinction.'

Bogert Trusts, Vol. 4, page 2934, Section 1002.

Citing cases from:
Circuit Court of Appeals,
U. S. Supreme Court,
California, Connecticut, Florida,

and fourteen other states.

Certainly the trust could not be terminated at the mere whim of the beneficiaries without court action."

Certainly then the instant case cannot be said to turn upon the same theory as the previous case.

In so far as the old case is concerned there is language which would indicate that subparagraph Arabic 5, under Roman II of the Trust Will (R. C. 11) (R. L. 13) is not included in the trust provisions. This is clearly not the case, however, because by the very first and all inclusive paragraph of Roman II, ALL of the residue is left in trust to be managed, controlled, leased, sold and distributed, in manner following: Then follow five, not four, subparagraphs and it is only in paragraph 5 that any power is given to "distribute" any of the proceeds of the real property, and it follows, considering the provisions for succession of trustees and the obvious magnitude of the estate as compared to

the paltry provisions of the first four Arabic paragraphs that the whole property was left in trust.

Indeed the Circuit Court of Appeals in the old case, page 584, col. 2, par. 2, admit as much, but say that the trust created is a

"* * * sort of fictitious trust".

The purpose of the trust nowhere appears in the will itself, and your petitioners respectfully urge upon this Court that they should not be bound by the extrinsic evidence erroneously admitted in the old case to vary the terms of the express trust.

The two cases were tried upon entirely conflicting theories, and the old case was not, and could not be, pleaded in bar of the second case.

If extrinsic evidence is to be admitted at all there may have been many reasons which the deceased never expressed to her children for wishing to protect them by placing the property in their joint control and subject to their joint discretion instead of allowing it to be squandered by the individual whim of either.

Whatever may be said of the old case as a bar to the rights of J. D. Collins it certainly cannot affect the rights of your petitioner S. D. Lount. Indeed the fact that this matter was first presented to the Circuit Court of Appeals by your petitioner J. D. Collins upon what now seems to have been a wholly erroneous theory, but accentuates the hurt suffered by your petitioner S. D. Lount, a true blood heir, for the decision in his appeal to the Circuit Court of Appeals upon the true theory was unquestionably prejudiced by the old case presented by petitioner Collins.

Indeed if the old case had been submitted upon the present theory it is possible that an entirely different result might have been reached.

It is next contended by respondents Skrehot and Young that your petitioners feared to try their case in the State Supreme Court.

J. D. Collins is a resident of Oregon and S. D. Lount is a resident of California (R. C. 2) (R. L. 2). They have an inalienable right to try their cases in Arizona in the Federal courts when the requisite amount is involved.

Counsel for petitioners was strongly persuaded that the will of Julia A. Lount, by the very great weight of both reason and authority, created a valid express trust without extrinsic aid.

Since the Circuit Court of Appeals had already been called upon to consider this will, albeit from a different point of view, it seemed best and most expedient to again present the matter to the Circuit Court of Appeals under what now seems to your petitioners as the only true theory of the will.

If the Circuit Court of Appeals should choose to abide by the first decision, though differently presented, then your petitioners would have the right to petition this court for certiorari.

Only in this way could a conflict between the Federal and State decisions be avoided. Either petitioner must ask the Circuit Court of Appeals to distinguish its own case or they must ask the State court to go counter to the Circuit Court of Appeals because of their own previous decisions.

The former course seemed the wiser and the better, since it is a special prerogative as set forth in rule 38 of the rules of this court to issue a writ of certiorari where such a conflict exists.

What the State court might, or might not, have done, confronted by the previous ruling of the Circuit Court of Appeals, is a matter of pure speculation. The important consideration is that the rulings of the Circuit Court of Appeals, which came originally from an erroneous theory of

this will, are contrary to the announced principles of the Supreme Court of Arizona upon an important point of local law as announced in two cases, and unless a certiorari is granted herein, this conflict can never be rectified and your petitioners S. D. Lount as well as J. D. Collins will be deprived of their rights which are clearly theirs under the will of Julia A. Lount, deceased.

It is also clear that the law as announced in the instant case is in conflict with the law as announced in

Vellacott v. *Murphy,* 16 F. (2d) 700,

upon a point of general law, applicable in Arizona, as elsewhere, to the effect that a trust is valid where there is a plurality of trustees, or beneficiaries.

It is not disputed that the matters involved are of local concern, nor that they are important matters.

Merits.

It is upon the merits that petitioners' contention is the strongest.

So clear does it seem that error has crept into the interpretation of this will, and how it has crept in by an original erroneous presentation of the whole matter, that this alone should incline this court to a favorable consideration of our petition, particularly of the petition of S. D. Lount, a blood heir, who is the victim of the acts of others and is about to lose his interest thereby.

The chief difficulty it seems in the whole matter has grown out of the failure on the part of the Circuit Court of Appeals and counsel for respondents, as well, to distinguish between the legal estate, which is devised in fee, subject to the trust, and the beneficial estates which are life estates.

True a remainder after a LIFE ESTATE would vest immediately in the children of deceased, but a POSSIBILITY OF RE-

VERTER arising as a resulting trust after the device of a fee, in trust, when the whole of the *res* was not consumed by the trustees would spring up at the termination of the trust.

To avoid any objection to the case as a moot question petitioners have alleged that a part of the estate has already reverted since the death of Willima B. Lount in 1924. The value of the part which has already reverted is alleged to be in excess of three thousand dollars ($3,000.00) (R. C. 4) (R. L. 3).

Petitioner S. D. Lount is likewise asking for an accounting and that an additional trustee be appointed. The trustee is joined as a party defendant and a declaratory judgment is asked (R. L. 9).

Under the circumstances it cannot be said that there are no present rights to be determined. There are many rights to be determined, and if they are not determined now the adverse claims of others may forever bar all claims of your petitioners in the property described and the whole thereof.

For all of the above reasons our petition for certiorari should be granted.

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